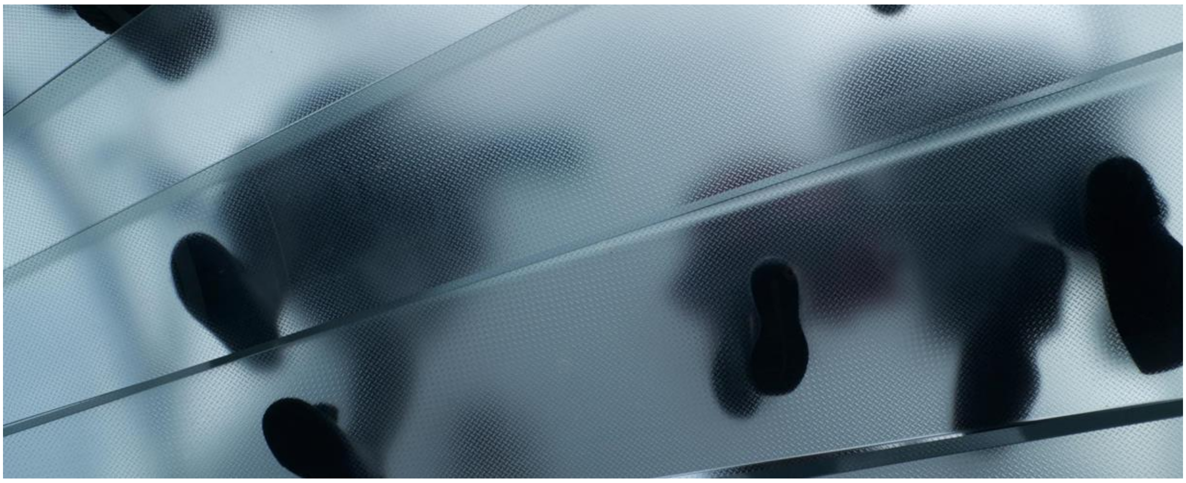

November 2016

# Online Update – Essential Information for Employers

## In the News

**Uber – Navigating employment status**

An Employment Tribunal has ruled that Uber drivers are "workers" rather than self-employed contractors, meaning they are entitled to some employment rights, such as the national minimum wage, paid statutory holiday and whistleblower protection.

The ruling highlights the complexities around navigating employment status issues, an area which has come under the spotlight recently. Plans have been announced for a specialist unit within HMRC to investigate companies that use agency staff or label workers as 'self-employed' to avoid giving them employment rights. While delivery companies and businesses operating in the 'gig economy' will be the focus, employers across all sectors should ensure they recognise the correct status of individuals who work for them.

The Uber ruling follows a claim by a number of Uber drivers for national minimum wage and statutory holiday pay. Two drivers were selected as test cases, one of whom also alleged he was subjected to a detriment for blowing the whistle. Uber argued that its drivers are self-employed and that the company simply provides a platform that connects drivers with passengers. However, the Employment Tribunal ruled that Uber drivers are workers, given the level of control the company has over them – for example, Uber sets the default fares and routes for journeys, it penalises drivers for declining or cancelling trips and it uses customer 'ratings' to manage their performance. Importantly, the ruling does not go as far as saying the drivers are employees, so they would not have unfair dismissal protection or the right to statutory redundancy pay.

*"The ruling highlights the complexities around navigating employment status issues..."*

The case is a reminder that the label given to people who work for you is not determinative. It also highlights the need for the contractual documentation to reflect accurately what happens in practice. Uber was heavily criticised for creating documents that did not reflect the reality of the relationship – eg it generated 'invoices' on behalf of drivers which were never shared with passengers, and also required passengers and drivers to agree to standard terms confirming that Uber does not provide transportation services.

Uber is reportedly planning to appeal the decision. However, in the light of these developments, employers may wish to review their use of agency staff and self-employed contractors to ensure they are properly classified and that any associated documentation is consistent with how the relationship operates in practice.

**Brexit – what now for EU nationals?**

Despite some soft assurances, the future of EU nationals working in the UK remains unclear following the EU referendum in June 2016.

A Home Office press release states that it "fully expects" the legal rights of EU nationals currently living in the UK to be "properly protected" following Brexit. Theresa May has ruled out an Australian-style points based system but has said the UK's immigration policy will continue to ensure that the "brightest and the best" can work in Britain. Chancellor Philip Hammond has also said he sees "no likelihood" that post-Brexit immigration controls would apply to "highly skilled, highly paid" EU workers.

In spite of these statements, many EU nationals in the UK are looking to apply for proof of their UK residency rights. EU nationals can apply to the Home Office for proof of their right to live and work in the UK, including permanent residency for those who have worked in the UK for at least five years. A new "European Passport Return Service" has been introduced which makes this process easier; applicants can now have their passports validated in person by their local authority, rather than posting the originals to the Home Office.

The main options for EU nationals at the moment are:

- **Registration certificates,** which are available for EU nationals who have been working in the UK for less than five years. Registration certificates can be obtained via a same-day appointment at one of the UK's premium service centres, meaning the application and supporting documents (including passport) are returned with a decision on the same day.

- **Permanent residence documents**, which are available for EU nationals who have been working in the UK for at least five years. Applications for permanent residence documents must be made by post and can take around six months to process. However, the new European Passport Return Service means that applicants can have their passports validated in person, with a copy posted to the Home Office, so they are not without their passports for any length of time. Applicants must complete an online application form and attend a local authority in person in order to use the European Passport Return Service.

*"... many EU nationals in the UK are looking to apply for proof of their UK residency rights."*

Registration certificates and permanent residence documents do not give EU nationals any additional rights – they merely serve as evidence of existing rights but may prove useful in future, depending on what the immigration regime looks like. Permanent residence documents are also a stepping stone to citizenship – EU nationals who have lived and worked in the UK for at least six years can apply for British citizenship provided they have first obtained a permanent residence document.

## Case Watch

**Holiday pay – where are we now?**

Two recent decisions consider the calculation of holiday pay where a worker receives regular payments, such as commission and overtime pay, in addition to basic salary.

***Commission***

**Case 1:** The employee in this case worked as a sales consultant for British Gas. On top of his basic salary, he was contractually entitled to commission on sales. In practice, commission made up approximately 60 per cent of his overall pay. However, in respect of holiday periods, he received basic salary only because he had no opportunity to earn commission. He claimed that British Gas had breached the Working Time Regulations by failing to pay anything for commission he would otherwise have accrued in respect of work during holiday.

The Employment Tribunal referred the case to the European Court of Justice (ECJ), which decided that, under EU law, holiday pay should reflect a worker's "normal remuneration" and should therefore include an amount in respect of average commission (see the July 2014 edition of **Online Update** for details). The case then returned to the UK courts and tribunals to determine the position under UK law. The Employment Tribunal ruled that holiday pay for the first 20 days' statutory holiday under UK law should include an element for average commission earned, in line with EU law. British Gas appealed to the Employment Appeal Tribunal (EAT) and then to the Court of Appeal. The Court of Appeal has now confirmed that UK law must be interpreted in line with EU law. Accordingly, where a worker's pay includes commission based on sales or results achieved, holiday pay for the first 20 days' statutory holiday must include an element of average commission.

***Voluntary overtime***

**Case 2:** The employees in this case worked for a council carrying out housing repairs. Fifty-six employees claimed that they were not receiving the correct holiday pay because certain additional payments for voluntary overtime, standby allowances and callout payments were not factored in. The cases of five employees were heard as representative claims. The five each worked differing amounts of voluntary overtime, with one working an extra day of overtime voluntarily every week and another working overtime very rarely. They all participated in a voluntary standby rota – typically for one week in every four or five weeks – for which they received standby and callout allowances. They claimed that, when on holiday, they should have received an amount in respect of voluntary overtime, voluntary standby allowances and voluntary callout payments in addition to their basic salary.

The employees won their claim. The Employment Tribunal ruled that, under EU law, workers should be paid their normal or average remuneration when they take holiday, so they do not suffer any financial disadvantage. The overtime payments formed part of the employees' normal pay here because, even though overtime was voluntary, it was worked regularly. Their holiday pay should, therefore, have included an element for voluntary overtime (apart from one of the employees who very rarely worked overtime). The same was true for the standby and callout payments, which also formed part of normal pay.

*"The cases confirm that regular commission and voluntary overtime payments should be included in the calculation of statutory holiday pay."*

***The cases confirm that regular commission and voluntary overtime payments should be included in the calculation of statutory holiday pay. This is consistent with other recent rulings which suggest that regular additional payments should be included. Strictly speaking, the principle applies only to the first 20 days of statutory annual leave each year (ie the minimum guaranteed by EU law). Employers are free to adopt a different approach to the additional eight days' statutory holiday in the UK and any contractual holiday granted in excess of the statutory entitlement.***

***In terms of overtime, case 2 confirms that the question is not whether the overtime is voluntary or contractual, but rather whether it is regularly worked. Where overtime is regularly worked, overtime pay forms part of the worker's normal pay and should therefore be included in holiday pay. In relation to commission, regular commission payments will***

***also form part of the worker's normal pay but the cases leave open the question of how a single annual commission or bonus payment should be treated. Arguably an annual payment does not form part of normal pay and so need not be included in holiday pay calculations.***

***In terms of next steps, few employers are likely to change the way they calculate holiday pay in the light of these rulings. Many employers have already changed holiday pay calculations to include regular additional payments, and these cases simply reinforce that approach. Other employers, who have been taking a 'wait and see' approach, may decide to continue to do so. British Gas is reportedly seeking leave to appeal the ruling on commission to the Supreme Court, so the outcome could change. There were over 900 cases against British Gas and many thousands of cases against other employers which were put on hold pending the outcome of the Court of Appeal ruling. However, these cases are likely to remain on hold (if not settled) until the Supreme Court has delivered its ruling on the issue. In the meantime, for a more detailed Q and A note on holiday pay, commission and overtime, please speak to your usual Employment Department contact.***

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**Investigating misconduct – how involved should HR be?**

The employee in this case was a university professor. He failed to report a sexual relationship he had with a student that he supervised, contrary to the university's policy. Another professor was appointed to investigate the issue and he produced an investigation report. An earlier draft of the report had been reviewed by the university's HR department and in-house lawyer. The draft contained a number of findings favourable to the employee, which were left out of the final report, eg that the relationship was consensual, that the employee had not abused his power and there was nothing immoral or scandalous about his conduct. Because the employee admitted what he had done, the investigating professor did not speak to the student involved.

The university's charter stated that an employee could only be dismissed for "good cause" in a number of specified circumstances, including for conduct of an "immoral, scandalous or disgraceful nature". Following a disciplinary hearing, the employee was dismissed and he brought an unfair dismissal claim.

The Employment Tribunal initially said that the dismissal was fair. It said that the words "immoral, scandalous or disgraceful" were, in effect, describing what, in modern language, is gross misconduct (the university's charter had been written in the 1920s). On appeal, the Employment Appeal Tribunal (EAT) disagreed, and said the dismissal was unfair. The EAT said that the language in the university's charter could not be equated with gross misconduct and the tribunal should have applied the express language in the charter, which set a higher test. The EAT was also concerned that the final version of the investigation report had been significantly altered in the light of advice from HR and legal. The EAT commented that the investigation report should not have been a joint effort but the advice of HR and legal should have been limited to matters of law and procedure. Finally, the EAT said it would have been good practice to interview the student concerned as part of the investigation, even though the employee admitted the allegations.

*"...HR must not have too much influence over the outcome of an investigation report or a disciplinary hearing."*

***This case is a warning that HR must not have too much influence over the outcome of an investigation report or a disciplinary hearing. HR's role is to advise what the disciplinary policy says about procedure and what the law says about unfair dismissal. HR should also advise on what sanctions have been imposed in similar cases, to ensure consistency across the organisation. HR can (and should) also challenge the manger conducting the investigation or disciplinary hearing to make sure all relevant factors have been taken into account. However, the investigation report must be the product of the manager's own work and reflect his or her own findings. Similarly, the chair of the disciplinary hearing must come to his or***

***her own conclusions on guilt and the appropriate sanction. If a dismissal case proceeds to an unfair dismissal hearing in the Employment Tribunal it will be the chair of the disciplinary hearing who will be expected to give evidence that it was his/her decision and explain his/her thinking.***

***The case is also a reminder that employers must comply with whatever standards are set out in their own disciplinary policies, even if this is higher than what the law requires. This highlights the importance of having a carefully drafted policy that does not impose unnecessary burdens on the employer.***

***Usually where a draft report is prepared specifically for review by a lawyer, whether in-house or external, this will be privileged and not disclosable to the Tribunal. It is not clear why privilege did not apply in this case but it may be because the original draft report was not prepared for this purpose. Ideally, if a draft report is prepared for review by a lawyer it should be marked clearly with words such as "Draft prepared for the purpose of obtaining legal advice".***

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## New Law

### Immigration

UK Visas and Immigration (UKVI) has announced a number of changes to Tier 2 visas, which will come into force on 24 November 2016. The key changes are that:

- the minimum salary threshold for Tier 2 General visas will increase from £20,800 to £25,000. In order to sponsor an employee under Tier 2 General, employers will need to pay at least £25,000 or the salary set out in the UKVI codes of practice for the role, whichever is higher;

- the minimum salary threshold for short-term Tier 2 Intra Company Transfer visas (less than 12 months) will increase from £24,800 to £30,000. In order to sponsor an employee under a short term Tier 2 Intra Company Transfer visa, the employer will need to pay at least £30,000 or the salary set out in the UKVI codes of practice for the role, whichever is higher;

- the Tier 2 Intra Company Transfer – Skills Transfer subcategory will be closed. This subcategory currently allows sponsors to transfer new recruits from an overseas group company or branch to the UK for up to six months to share skills and knowledge.

These changes will apply to all certificates of sponsorship issued on or after 24 November 2016.

### Childcare scheme

The Government is introducing a new tax free childcare scheme to replace the current employer supported childcare voucher scheme. The new scheme will allow working families to claim 20 percent of childcare costs for children under five (later to be extended to children under 12) up to a maximum of £2,000 per child each year.

Unlike the current childcare voucher scheme, the new scheme will not depend on participation by employers, as it will be open to all eligible working couples, where both parents are employed or self-employed and neither parent is an additional rate taxpayer. Existing childcare voucher schemes will be closed to new joiners once the new scheme is in place. Any employee who is already a member of a childcare voucher scheme will be able to choose whether to stay

> *"The Government is introducing a new tax free childcare scheme to replace the current employer supported childcare voucher scheme."*

within that scheme or join the new tax free childcare scheme instead.

The Government has said it plans to launch the new scheme in early 2017, although no date has been set.

## Watch this Space

**Shared parental leave**

A male employee of Network Rail has been awarded almost £30,000 for sex discrimination (including £6,000 for injury to feelings) because he was offered only statutory pay during shared parental leave, while mothers were given full pay. The case is unusual because the Network Rail policy expressly provided that mothers could receive up to 26 weeks' full pay for shared parental leave but fathers and partners would be paid at the lower statutory rate only for such leave (regardless of when they took it). Network Rail admitted that its policy was indirectly discriminatory and has since changed it (the policy was not directly discriminatory against men because it also applied to female partners in same-sex couples who took shared parental leave).

The case does not deal with the trickier issue of whether a male employee who receives statutory pay for shared parental leave can claim indirect sex discrimination where female employees receive enhanced pay for maternity leave. We understand arguments along these lines are being made and may find their way to the Employment Tribunal. **Online Update** will report any developments.

**Asda equal pay claims**

A preliminary ruling has cleared the way for thousands of equal pay claims to proceed against Asda. Over 7,000 female employees who work in Asda's stores (mainly at the check-out and stacking shelves) have brought claims arguing they are entitled to the same pay as staff in Asda's warehouses, who are mainly men.

As a preliminary point, Asda argued that the claims could not proceed because it divided its business into separate retail and distribution arms with different pay structures. However, an Employment Tribunal has ruled that the store and warehouse employees are effectively on the same pay structure, so the claims can go ahead. It is now for the Employment Tribunal to decide whether the work of the predominantly-female store employees is of equal value to the work of the predominantly-male warehouse employees or whether, as Asda claims, there are legitimate reasons for the differences in pay. The value of the claims has been estimated at over £100 million, which makes it one of the largest ever groups of equal pay claims in the private sector.

## Our Work

Since the last edition of **Online Update**, our work has included:

- advice regarding the departure of a senior executive director in a listed business
- advising on redundancy collective consultation issues for a client making multiple redundancies on a national basis
- working with an outsourcing client in relation to the loss of a services contract and the application of TUPE and the Acquired Rights Directive to its employees in the UK and five other EU member states
- advising a UK plc in relation to an application to establish a European Works Council
- advising an international client with a large UK sales force on its commission and hourly pay arrangements
- presenting a webinar on the gender pay gap reporting requirements and the practical considerations for employers.

**If you have any queries on this edition of Online Update, please contact any member of the Employment Department**

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